82-1416

No.

IN THE
SUPREME COURT
OF THE UNITED STATES

ANTHONY TASSONE
Petitioner

-vs-

UNITED STATES OF AMERICA
Respondent

COA NO.
80-1684

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

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Petitioner, Anthony Tassone, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

QUESTIONS PRESENTED

A.

Whether Petitioner was denied a fair trial, in violation of the Fifth Amendment to the United States Constitution, where the Government offered testimony of Petitioner's alleged participation in a conspiracy to manipulate horse races, which testimony the Government knew, or should have known from public records in its hands, was perjurious.

B.

Whether Petitioner was denied a fair trial in violation of the Fifth Amendment to the United States Constitution and of 28 U.S.C. §455, where the Trial Judge refused on timely motion to recuse himself when it was revealed that he owned a substantial interest in real estate in common with the owners of the race tracks where the alleged manipulation of horse races occurred.

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INDEX TO AUTHORITIES CITED

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit here sought to be reviewed has not yet been reported and is attached as Appendix A. The opinion of the United States District Court for the Eastern District of Michigan has not been reported and is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 13, 1982, and rehearing was denied December 27, 1982. This Petition for Certiorari is brought within ninety days of the latter date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

28 U.S.C. §455 provides in pertinent part as follows:

> "§455. Disqualification of justice, judge or magistrate
>
> "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

STATEMENT OF THE CASE

Defendant Anthony Tassone was tried along with several co-defendants in the District Court for the Eastern District of Michigan under a seven-count indictment growing out of a highly-publicized alleged scheme to fix horse races at two race tracks in the Detroit area. He was convicted on May 12, 1980, under Count 2 of the indictment, alleging conspiracy to violate 18 USC §224, the sports bribery statute, and Counts 3 through 7, alleging violations as to particular races. The jury could not agree as to Count 1, alleging wire fraud in violation of 18 USC §1343, and a mistrial as to that Count was declared.

The crux of the Government's case was the testimony of one Anthony Ciulla, who was the chief architect of the alleged conspiracy but was granted immunity. Defendant Tassone's alleged involvement in the scheme was as a financial backer, and Ciulla's testimony as to a number of meetings with Defendant was the main evidence against him. (Trial Transcript, pp 1192-1195). Ciulla testified that the first such meeting took place in Detroit during June, 1973. When it offered this testimony, the Government had in its possession a "rap sheet" showing that Defendant had been arrested in New Jersey on May 23, 1973, and incarcerated in the Trenton State Prison on July 9. Nevertheless, the Government claims ignorance of the fact that Defendant was confined in the Mercer County Jail during the entire month of June and was thus incapable of meeting Ciulla in Detroit. (Government's Response to Defendant's Motion, pp 3-4). This fact appears in the jail records introduced by Defendant at trial and was verified by the testimony of Anthony Fucello, the jail warden, and of another jail official (T.T., pp 3218-3223; 3247). If the Government actually believed Ciulla's testimony that Defendant was in Detroit in June, 1973, it could only have done so by willfully refusing to investigate Defendant's whereabouts between his arrest and imprisonment.

The trial lasted two months, from March 13 to May 12, 1980. On the third day, after the jury had been impaneled but before it had been sworn, the trial judge announced that he owned 13.3% of an apartment building of which 50% was owned by the two individuals who owned the two race tracks allegedly corrupted by the fixing scheme. Defendant immediately moved that the judge recuse himself under 28 USC §455, which he refused to do. (T.T., pp 242; 270-273).

After trial Defendant renewed, unsuccessfully, its motion for recusal, and also moved to set aside the conviction on grounds of prosecutorial misconduct in offering the perjurious testimony of Anthony Ciulla. The Government responded that it had no knowledge of the perjury and that, even if perjury was used, Defendant had sufficient notice of the jail records to produce them as evidence.

After Defendant's post-trial motions were denied, appeal was taken to the United States Court of Appeals for the Sixth Circuit assigning as error the failure of the trial court to grant relief from prosecutorial misconduct, refusal of the court to recuse, and the court's method of polling the jury, the last error not being assigned in this Court. The Court of Appeals rejected Defendant's appeal on all points by an order filed October 13, 1982. As to the prosecutorial misconduct, it held (1) that the Government could not be held to have known that Defendant was in jail at the relevant time, despite possession of the "rap sheet", and (2) that there had been no prejudice because Defendant was not denied access to the information required to detect the perjury. (Order of the Court of Appeals, pp 4-5). As to the recusal, the court held that a "collateral business relationship", without a financial interest in the subject matter of the controversy or in a party, did not require recusal under 28 USC §455(a). (Order, p 8).

Defendant's motion for rehearing was denied on December 27, 1982.

ARGUMENT

I

Certiorari should be granted to resolve to issues regarding a prosecutor's duty to refrain from knowingly offering perjurious testimony, to wit:

A. THE ORDER OF THE COURT OF APPEALS CONFLICTED WITH A DECISION OF THE SECOND CIRCUIT IMPOSING THE BURDEN OF DETECTING AND ABORTING PERJURY UPON THE GOVERNMENT; AND

B. THE COURT OF APPEALS APPLIED A STANDARD OF PREJUDICE APPROPRIATE TO CONCEALMENT OF EXCULPATORY EVIDENCE RATHER THAN ONE APPROPRIATE TO KNOWING OFFER OF PERJURIOUS TESTIMONY, AND IN SO DOING, IT INVITED PROSECUTORIAL MISCONDUCT.

It has long been held that the right of an accused to due process is violated when the prosecution knowingly offers perjurious testimony on a material point. *Mooney* v *Holohan*, 294 US 103 (1935); *Pyle* v *Kansas*, 317 US 213 (1942); *Napue* v *Illinois*, 360 US 264 (1959); *Giglio* v *United States*, 405 US 150 (1972). The instant case presents two questions which have not been settled by this Court: the burden of detecting perjury and the relationship between offering perjurious testimony and suppressing the evidence of its perjury.

In the instant case, despite overwhelming evidence that Defandant could not have been in Detroit when Ciulla said he was, and despite the admitted fact that the Government had a "rap sheet" indicating that Defendant was in trouble with the law in a distant state at that time, the Court of Appeals permitted the Government to disclaim all knowledge of Defendant's incarceration and to indulge in totally unfounded speculation that Defendant might have been on

work release. Clearly, the court imposed no duty upon the Government to ascertain the truth of the testimony it proposed to offer even though it had information calling that testimony into question. This holding conflicts with the decision of the Second Circuit in *United States* v *Rosner*, 516 F2d 269 (2nd Cir 1975); *cert. denied*, 427 US 911 (1976), that the burden of detecting and aborting perjury rests on the Government. The holding of the Second Circuit, requiring at least that the Government act upon the information it has, offers accused persons a more effective protection against government misconduct without imposing unreasonable burdens upon the Government.

The paradigm case of an offer of perjurious testimony occurs when a witness who has entered an agreement with the prosecution denies the existence of the agreement on the witness stand, the defendant being unaware of the agreement until after the trial. *Napue* v *Illinois*, *supra; Giglio* v *U.S.*, *supra; Housden* v *United States*, 517 F2d 69 (4th Cir 1975); *DuBose* v *Lefevre*, 619 F2d 973 (2nd Cir 1980). In such cases, the question might be presented whether the prosecution's wrongdoing lay in presenting the testimony or in concealing the agreement from the defendant. The answer to that question is important to determining whether the wrongdoing requires reversal. If the primary wrong lies in the concealment, there need be no reversal if the defendant has knowledge of the facts needed to expose the perjury. If the primary wrong lies in the offer of testimony itself, however, reversal is required if the testimony was on a material point. *United States* v *Agurs*, 427 US 97, 104 (1976); *Smith* v *Phillips*, ___ U.S. ___, 102 S Ct 940, 947 (1982) (footnote).

In the instant case, the Court of Appeals reasoned that a defendant who has access to all the information possessed by the Government cannot obtain reversal if perjurious testimony is offered, holding in effect that there is no prejudice absent something akin to suppression. The effect of the court's holding is to permit a prosecutor to offer false

testimony, even as here on the facts of the alleged crime, without penalty, provided the defendant is offered a reasonable opportunity to expose the perjury. The corrupting effect such a rule would have on the fact-finding process can easily be imagined.

II

CERTIORARI SHOULD BE GRANTED TO DECLARE THAT WHERE A TRIAL JUDGE HAS A SUBSTANTIAL COMMUNITY OF INTEREST WITH PERSONS WHOSE INTERESTS ARE POTENTIALLY SEVERELY AFFECTED BY THE OUTCOME OF THE TRIAL, THE JUDGE SHOULD RECUSE HIMSELF UNDER 28 USC §455(a).

The general duty of a trial judge to recuse himself, established by 28 USC §455(a), was enacted in 1974, which enactment worked a major change in the law by abolishing the previous "duty to sit" if the judge was sure of his own capacity to be impartial and replacing the subjective judgment with an objective test focussing on the appearance of partiality. *S.C.A. Services* v *Morgan*, 557 F2d 110 (7th Cir 1977); *Blizard* v *Fuchette*, 601 F2d 1217 (1st Cir 1979); *Potashnick* v *Port City Construction Co*, 609 F2d 1101 (5th Cir 1980); *cert. denied*, 449 US 820 (1980); *Bradley* v *Milliken*, 620 F2d 1143 (6th Cir 1980); *cert. denied*, 449 US 870 (1980). Such a standard plainly requires the sensitive exercise of discretion, but the Court of Appeals in the instant case applied a standard permitting the exclusion from consideration of relationships with entities which are not formal parties to the action. The court relied on *United States* v *Ravich*, 421 F2d 1196 (2nd Cir 1970); *cert. denied*, 400 US 834 (1970), a pre-1974 case, and *United States* v *Sellers*, 566 F2d 884 (4th Cir 1977), holding that tenuous relationships with banks do not force recusal from the trial of persons accused of robbing those banks. Similarly, in *Virginia Electric and Power Co* v *Sun Shipbuilding and Dry Dock*, 539 F2d 357 (4th Cir 1976), it was held that a judge should not recuse himself solely because he was a customer

of a public utility involved in the action. These cases may well be correctly decided on their facts, but they should not be read to establish a rule that indirect relationships with the underlying fact situation do not force recusal. A better approach is that adopted by the Fifth Circuit in *Potashnick* v *Port City Const Co, supra*, where the court looked at the business relationship as a whole, without attempting to categorize it as direct or "collateral".

In the instant case, the trial judge had a substantial business investment in real estate partially owned and wholly managed by the owners of the two race tracks where the alleged fixing occurred. Neither the race tracks nor their owners were formal parties to the criminal proceedings. It must be obvious to every reasonable person, however, that a race track can be destroyed as a business if the integrity of its betting is called into question in the sort of proceeding involved in the instant case. A judge related financially to the owners of the track, however sincerely impartial he may be in his own mind, cannot but be suspected of having an interest in vindicating the track by uprooting the alleged conspiracy which threatens public confidence in it. Despite the "collateral" character of the judge's relationship, he should recuse himself.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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No. 80-1684

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

-vs-

ANTHONY TASSONE
Defendant-Appellant

ORDER
(Filed: December 27, 1982)

Before: MERRITT and CONTIE, Circuit Judges; and NEESE, District Judge.*

The defendant Tassone has petitioned the panel for rehearing. Upon consideration, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, *Clerk*

* The Honorable C. G. Neese, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Nos. 80-1657; 80-1684; 81-1382

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

-vs-

BENJAMIN SERIDO, (80-1657)
ANTHONY TASSONE, (80-1684)
LARRY KOOJI KUNITAKE, (81-1382)
Defendants-Appellants

ORDER
(Filed: October 13, 1982)

Before: MERRITT and CONTIE, Circuit Judges; and NEESE, District Judge.*

John P. Hehman, *Clerk*

These cases involve the appeals by defendants Serido, Tassone and Kunitake of their convictions involving a horse race fixing scheme in Detroit, Michigan. These defendants, as well as five other co-defendants, were charged in a seven-count indictment for their participation in a conspiracy to knowingly influence, by fraud and bribery, thoroughbred horse races at the Detroit Race Course and the Hazel Park Race Track. Count 1 charged the defendants with the use of wire communications in the execution of a scheme and artifice to defraud in violation of 18 U.S.C. §1343. Count 2 charged the defendants with participating in a bribery conspiracy of sporting events in violation of 18 U.S.C. §224. Counts 3 through 7 charged various defendants with participating in the fixing of specific races on specific dates.

* The Honorable C. G. Neese, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Defendant Serido was charged with violating counts 1, 2 and 4 and was found not guilty on count 4 but guilty as to counts 1 and 2. Defendant Tassone was charged with violating counts 1 through 7 but was found guilty of counts 2 through 7. The trial court declared a mistrial as to count 1. Defendant Kunitake was charged with violating counts 1, 2, 5 and 6. He was acquitted on count 1 and the district court declared a mistrial with regard to counts 2, 5 and 6. He was then retried and found guilty of counts 2, 5 and 6.

The conspiracy to knowingly influence horse racing at the two race tracks was initiated and orchestrated by unindicted co-defendant Anthony Ciulla. Mr. Ciulla was the government's key witness in the conviction of these defendants. He was granted immunity in exchange for his testimony. Mr. Ciulla put together this conspiracy by the following means: (a) obtaining financial backing for the scheme from defendant Tassone, (b) bribing owners, trainers and groomers to allow access to horses for the purpose of administering drugs and stimulants, (c) bribing jockeys to manipulate the outcome of horse races, (d) causing and attempting to cause certain persons to place wagers on certain predetermined races for the purpose of increasing profits from wagering pools, and (e) administering drugs and stimulants to race horses.

The three defendants have raised several issues concerning their convictions. We find no merit in these assignments of error, however, and we affirm all three convictions.

Defendants Tassone and Serido first assert prosecutorial misconduct in violation of their due process rights. They assert that the prosecutor improperly used the testimony of witness Ciulla knowing said testimony to be false and perjured.

Ciulla testified that in June, 1973, he met with defendants Tassone and Serido in Detroit, Michigan. At this time, however, Tassone was in prison in New Jersey. Defendant Tassone introduced prison records, as well as

the testimony of two prison officials, indicating that he was incarcerated in June when this meeting allegedly occurred. The defendants claim that the government deliberately deceived the jury by using the testimony of Ciulla concerning the Detroit meeting in June, 1973. The defendants assert that the government had a duty to refrain from using this testimony or a duty to correct it when it appeared.

Due process is violated when a prosecutor obtains a conviction with the aid of evidence which he knows is false regardless of whether such evidence concerns the prosecutor's proof or the credibility of a witness. *Napue* v *Illinois*, 360 U.S. 264 (1959). Further, due process is violated and a new trial is required when a prosecutor intentionally or inadvertently fails to correct materially false testimony relevant to the credibility of a key government witness. *Giglio* v *United States*, 405 U.S. 150 (1972).

In the present case, there is no evidence that the prosecutor knowingly used perjured testimony. First, there is no evidence that the testimony of the government's witness was deliberately falsified concerning the June meeting. Second, the government records indicate that defendant Tassone was arrested on May 23, 1973, and that he was incarcerated in the Trenton State Prison on July 9, 1973. It is not clear, however, that the government knew that the defendant was jailed in the Mercer County Jail since May 25, 1973. At the time that Ciulla testified, we cannot find that the government knew that defendant Tassone was in prison for the entire month of June. Further, records of arrest or incarceration do not conclusively prove that such a meeting could not have possibly occurred. Conceivably, the defendant may have obtained leave from prison for some reason. *See United States* v *Indelicato*, 611 F.2d 376 (1st Cir. 1979).

Assuming arguendo, however, that prosecutorial misconduct exists in this case, we do not believe that the defendant was prejudiced thereby. A new trial is required only when the tainted evidence was material to the case.

And, the materiality requirement recognizes that the misconduct's effect on the trial, not the blameworthiness of the prosecutor, is the crucial inquiry for due process purposes. *Smith* v *Phillips*, ___ U.S. ___, 102 S.Ct. 940 (1982). The only question is whether the defendants received a fair trial.

In the cases *Napue* and *Giglio*, *supra*, neither the prosecutor nor defense counsel had knowledge that the prosecution witnesses' testimony was false. In the present case, however, the defense counsel were aware that, contrary to the testimony of Ciulla, defendant Tassone was incarcerated during the month of June, 1973. Further, the defense counsel chose not to cross-examine Ciulla concerning the inconsistency. Rather, Ciulla's testimony was impeached by the introduction of prison records and the testimony of prison officials that defendant Tassone was incarcerated at the time that the Detroit meeting was to take place.

Unlike *Napue* and *Giglio*, *supra*, therefore, the trial in this case was not substantially affected by the inaccessibility, at the time of trial, of information that would enable the defendants to bring the matter before the jury for its evaluation. *United States* v *Bruner*, 657 F.2d 1278 (D.C. Cir. 1981); *United States* v *Iverson*, 648 F.2d 737 (D.C. Cir. 1981); *Ross* v *Heyne*, 638 F.2d 979 (7th Cir. 1980). The defendants were provided with an adequate opportunity for cross-examination and impeachment concerning the allegedly perjured and at least inconsistent evidence. We cannot find that the defendants have been denied a fair trial.

The defendant Tassone further argues, however, that Ciulla's testimony caused him to introduce prejudicial evidence. Defendant Tassone asserts that in order to impeach Ciulla's testimony he was required to introduce the prejudicial evidence that he was incarcerated during the relevant period. Reviewing the evidence in this case, however, we find that this argument is without merit. The government

introduced evidence of Tassone's incarceration in proving that Ciulla met with Tassone in August, 1973 at the Trenton State Prison. Thus, the jury would have known of Tassone's incarceration even if Ciulla's testimony concerning the Detroit meeting was not contradicted by the prison evidence.

Defendant Tassone raises two additional issues. First, he asserts that the district court improperly coerced a juror to vote in open court. On May 12, 1980, the jury foreperson advised the trial court that the jury could not reach a verdict regarding some of the defendants. The court was advised, however, that the jury had arrived at a verdict concerning defendants Serido and Tassone. By agreement of counsel, the jury was asked to return a verdict concerning the defendants on which it could agree. The jury found Tassone guilty of counts 1 through 7. The court then polled the jury, pursuant to rule 31 (d) of the Federal Rules of Criminal Procedure, and foreperson Klea responded that as to Tassone it was not her verdict. After a bench conference with counsel, the court then questioned Mrs. Klea as to each count against defendant Tassone. She first responded that it was her verdict on each count. But, upon a second poll, Mrs. Klea stated that it was not her verdict as to count 1 but that it was her verdict as to the remaining counts.

Upon review of the transcript of the colloquy between the court and foreperson Klea, we find that the district court's inquiry was not coercive. The purpose of a jury poll is to determine if there is a valid verdict based on unanimity. *United States* v *Love*, 597 F.2d 81 (6th Cir. 1979). If a lack of unanimity is discovered, the district court may either discharge the jury or retire it for further deliberations. The court, however, may question a juror to clarify a verdict and to elicit an unequivocable expression of the juror's vote. *United States* v *Lockhart*, 366 F.Supp. 843 (E.D. Pa. 1973), *aff'd*, 495 F.2d 1369 (3d Cir. 1974).

In the present case, foreperson Klea had already made her decision concerning the Tassone verdict and the district court's inquiry only identified that the lack of unanimity existed only with regard to count 1. Foreperson Klea was not coerced into surrendering a view conscientiously entertained.

Tassone finally argues that the trial judge should have recused himself under the provisions of 28 U.S.C. §455(a). The Detroit Race Course and Hazel Park Race Track were owned and operated by two individuals who, along with the trial judge, held an ownership interest in an apartment complex. The trial judge owned a 13.3% interest in the apartment complex and the two race track owners owned a 50% interest. The race track owners acquired their interest independent of and after the trial judge had acquired his interest. No other relationship existed between these individuals, and the trial judge did not associate with the race track owners personally or in any other way. This relationship was revealed to counsel by the trial judge upon discovery during the second day of impaneling the jury.

> Section 455(a) provides:
>
> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Under the provisions of this statute, a trial judge must disqualify himself if a reasonable man, were he to know all the facts and circumstances, would harbor doubts as to the judge's impartiality. *Potashnick* v *Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). Under the facts of this case, we find that the trial court did not abuse its discretion in refusing to recuse himself. The court revealed the relationship to counsel to avoid any appearance of partiality. Further, the court disclosed that no interest or relationship existed between himself and the two race track owners other than the collateral

business relationship. Finally, the court tried the case with the assistance of a jury. We conclude that a reasonable man, with knowledge of these facts, would not question the trial court's impartiality in this case based on a remote business association. Additionally, the trial judge possessed no financial interest in the subject matter in controversy or in a party to the proceeding. 28 U.S.C. §455(b) and (d).

Defendant Serido raises five issues in addition to the claim of prosecutorial misconduct. First, he asserts that the district court failed to fully investigate the possibility of improper contact with a juror. On May 8, 1980, the trial court's law clerk received a phone call from an unknown woman stating that she was a juror. She stated that one of the jurors told other jurors that she got drunk with her husband, discussed the case with him and that her husband told her what to do on the case. The clerk asked for the juror's name but the woman hung up.

The trial court conducted an in-chambers questioning of foreperson Klea concerning the call. Mrs. Klea stated that she did not hear any such talk. Mrs. Klea, however, told the court she had drawn her own conclusion and then attempted to relate something to the court. The court refused to allow Mrs. Klea to relate anything further. The Court then re-instructed the entire jury concerning their duty as jurors. Finally, upon the jury's rendering of a verdict, the court questioned each juror concerning the phone call and found that none of the jurors had knowledge of the phone call or its subject matter. The trial court refused to allow inquiry of Mrs. Klea concerning what she wished to relate to the court on the basis of Federal Rules of Evidence 606(b).

The trial court had a duty to inquire into the character of potentially prejudicial material, the extent of the exposure and its effect on the jury's ability to render an impartial verdict. *United States* v *Spinella*, 506 F.2d 426 (5th Cir.), *cert. denied*, 423 U.S. 917 (1975). But the court also had a duty to be careful not to make inquiry with regard to

the jury's deliberation of the evidence. *Fed. R. Evid.* 606(b). In this case, the court determined that all of the jurors had no knowledge of the phone call or the subject matter of the call. Having made this determination, that no improper jury contact occurred, the court properly refused inquiry into what Mrs. Klea attempted to tell the court in-chambers.

Defendant Serido next contends there was a fatal variance between the single conspiracy alleged in the indictment and the two conspiracies proven at trial. He also asserts that the evidence revealed a conspiracy between himself and co-defendant Owens, of receiving payment from clients for information on how to wager on certain races, which is not conduct violative of the sports bribery statute, 18 U.S.C. §224. We disagree. Unlike the case *Kotteakos* v *United States*, 328 U.S. 750 (1946), the evidence indicates that the scheme of Serido and Owens became part of Ciulla's bribery conspiracy. Ciulla's testimony reveals that the clients of Serido and Owens were used in order to get them to wager on certain fixed races, thereby increasing profits within the wage earning pools. Thus, the government sufficiently proved one conspiracy as well as conduct violative of 18 U.S.C. §224. *United States* v *Phillips*, 630 F.2d 1138, 1146 (6th Cir. 1980).

Related to these claims, we also find that there exists sufficient evidence to sustain Serido's convictions on counts 1 and 2. Determining the sufficiency of the evidence requires the Court to view the evidence in a light most favorable to the government, *Glasser* v *United States*, 315 U.S. 60 (1942), and to determine whether there exists sufficient evidence for a rational juror to find that the defendant is guilty beyond a reasonable doubt. *U.S.* v *Francis*, 646 F.2d 251, (6th Cir.) *cert. denied*, ___ U.S. ___, 102 S.Ct. 637 (1981). Under this standard, credibility choices must be determined in favor of the government. Accordingly, the testimony of the government's witness Ciulla is sufficient to implicate defendant Serido in the conspiracy charged in counts 1 and 2.

Finally, defendant Serido contends that an in-court identification by F.B.I. agent Langford should have been excluded because of the out-of-court identification procedures used. Assuming this in-court identification was based on unreasonably suggestive out-of-court identifications and was unreliable under the totality of the circumstances, *Neil* v *Biggers*, 409 U.S. 188 (1972), we find this error to be harmless. This identification evidence was cumulative in that witness Ciulla and another FBI agent identified Serido as being with Ciulla on September 15, 1973. Additionally, defendant Serido was acquitted on count 4, which charged Serido with participating in the fixing of the tenth race on September 15, 1973. No prejudice to the defendant occurred as a result of the introduction of this evidence.

Defendant Kunitake has raised two issues: that he was granted immunity from prosecution in exchange for his grand jury testimony; and, that the district court improperly limited the cross-examination of witness John Hamilton concerning an extortionate demand allegedly made by Ciulla in 1978. Reviewing the entire record as well as the parties' briefs, we conclude that the district court's finding, that no informal grant of immunity was given to Kunitake in exchange for his grand jury testimony, was not clearly erroneous. We, therefore, find *Santobello* v *New York*, 404 U.S. 257 (1971), inapplicable. Further, the fact that the district court excluded the defendant's grand jury testimony, based on a finding that the defendant possessed a subjective belief that immunity had been granted, rendered any error harmless.

In regard to the limit placed on the cross-examination of witness John Hamilton during the course of defendant Kunitake's second trial, we find that the district court did not abuse its discretion. Hamilton's testimony was a general attack on the credibility of the government's key witness. The evidence was offered only to show Ciulla's willingness to fabricate testimony. It was not a particular attack directed toward revealing biases, prejudices or ulterior mo-

tives of the government's witness as they relate to the issues in this case. *Davis* v *Alaska*, 415 U.S. 308 (1974). The district court properly excluded the extrinsic evidence under Federal Rules of Evidence, 609(a) and (b). *See United States* v *Withers*, 637 F.2d 445 (6th Cir. 1980).

Accordingly, the convictions of all three defendants are hereby AFFIRMED.

AFFIRMED BY ORDER OF THE COURT.

(s) John P. Hehman, *Clerk*

ISSUED AS MANDATE ON CASE NOS. 80-1657 and 80-1684 *ONLY*

January 4, 1983

COSTS: NONE